82-1067

No. ———

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IN THE

SUPREME COURT OF THE UNITED STATES

JAMES E. GAMBREL
CONSUMER ASSOCIATION OF KENTUCKY, INC.
CITIZENS FOR DENTURISM IN KENTUCKY, INC.
HAROLD RAY DRUIN
JAMES RENFRO, SR.
JAMES RENFRO, JR.
DAN HAUNER
JAMES GAMBREL
CHESTER HUDSON - - - - - - - Petitioners

versus

THE KENTUCKY BOARD OF DENTISTRY,
JAMES W. HOLLIDAY, D.M.D.
HAROLD BRADFORD, D.M.D.
JAMES M. SMITH, JR., D.M.D.
O. HARLAN WILSON, D.M.D.
HOWARD TITSWORTH, D.M.D.
PAUL WEBB, D.M.D.
JOHN HOYLE
STEVEN L. BESHEAR, As Successor to Robert Stephens, Attorney General, Pursuant to KRS 418.075
LEWIS WHIPPLE, D.M.D.
DOUGLAS KENNEDY, D.M.D.
GORDON KING, D.M.D.
WILLIAM WILL[illegible], D.M.D.
GLENN M. BARNES, D.M.D.
THE KENTUCKY DENTAL ASSOCIATION, INC - Respondents

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE KENTUCKY DENTAL ASSOCIATION, INC. - - - - - - - - - - *Respondents*

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COUNTERSTATEMENT OF THE CASE

The Appellants, James Gambrel, James Renfro, Sr., James Renfro, Jr., Dan Hauner, and Chester Hudson are a small renegade band of unethical dental laboratory technicians who carry the banner of the so-called "denturists" movement. The simple definition of "denturists" is any illegally operating dental laboratory technicians who actually take impressions of the human teeth, adjusts and places the denture in the mouth of individuals directly in violation of Kentucky law.

Kentucky law provides in KRS 313.010(2):

> Any person shall be regarded as "practicing dentistry" who, for a fee, . . . takes impressions of the human teeth or jaws to be used directly in the fabrication of any intraoral appliance, or shall construct, supply, reproduce or repair any prosthetic denture, bridge, artificial restoration, appliance or other structure to be used or worn as a substitute for natural teeth, *except upon the written laboratory procedure work order of a licensed dentist* and constructed upon or by the use of casts or models from an impression taken by a licensed dentist. (Emphasis added)

In light of this unambiguous statute, and in view of the fact that "denturists" advocate that dental laboratory technicians should be allowed to take impressions of the human teeth and to adjust and place the dentures directly in the mouth of patients, the "denturists" attempted unsuccessfully in 1978 before the

Kentucky General Assembly to change KRS 313 so as to authorize the acts which concededly are illegal. In this lawsuit, the Petitioners launch a collateral attack.

The Petitioners manufactured this lawsuit by hiring a "patient" to visit numerous dentists in Southwest Jefferson County for the supposed purpose of obtaining a set of dentures. This patient demanded that the dentists give him a written work order which could be taken to any dental laboratory technician for the purpose of the fabricating of the intraoral appliance. The dentist did, of course, refuse this offer for fear that this "patient" would not return to the dentist for the refittings and realignment essential for good dental practice. As a result of the failure of these individual dentists to provide the patient with the written work order, this suit was initiated. The Petitioner would have this court believe that as a result of the failure of five dentists to hand over a written work order to a "patient" that the Kentucky Dental Association has somehow "permeated its membership with the knowledge that they should restrict their denture prescriptions only to those laboratories that cooperate and approve of the Dental Association's philosophies" (Petitioner's Brief, page 4).

The Petitioner pleads that the "consumer" and the various private investigators hired to entrap the dentists all state that no dentist contacted would allow the denture prescription to be sent to Gambrel's laboratory. These dentists, however, testified that they have a longstanding relationship with certain ethical dental laboratories, and since the dentists are ultimately re-

sponsible for the proper fit and construction of the denture, dealing with Gambrel's denture studio was wholly unacceptable. Several physicians testified by Affidavit that dealing with different dental laboratories would cause undue confusion and concern as to quality of workmanship. The Respondent therefore suggests that lack of ability rather than some overt boycott or conspiracy is the simple answer for Gambrel's lack of attracting new dentist clients.

The Petitioner's complaint originally asked for a declaratory judgment and an injunction against the practices that the Petitioners claim are in violation of the Sherman Anti-trust Acts and the First Amendment. Although the Petitioners have abandoned their First Amendment complaint, the District Court also held that the Petitioners' complaints about Kentucky's regulation of dental care are properly addressed to the Kentucky Legislature, and not to the Federal courts.

ARGUMENT

Kentucky laws regulating the practice of dentistry pursuant to KRS 313 precludes any relief sought by the Petitioners. The Petitioners' Petition for Certiorari simply stated is that the work order prepared by and at the direction of a dentist for the construction of any intraoral appliance or denture belongs to the patient. The Petitioners claim that it is the patient, and not the dentist, who has the right to select the dental laboratory of his choice. The Petitioners further allege that the refusal to allow the patient to

choose his own laboratory somehow interferes with the Petitioners' advertising campaign.

In Kentucky, the process of supplying dentures and other intraoral appliances to a patient constitutes the practice of dentistry. As previously cited, KRS 313.-010(2) states:

> Any person shall be regarded as "practicing dentistry" who, for a fee, . . . takes impressions of the human teeth or jaws to be used directly in the fabrication of any intraoral appliance, or shall construct, supply, reproduce or repair any prosthetic denture, bridge, artificial restoration, appliance or other structure to be used or worn as a substitute for natural teeth, *except upon the written laboratory procedure work order of a licensed dentist* and constructed upon or by the use of casts or models from an impression taken by a licensed dentist. (Emphasis added)

The Petitioners may counter that they are not interested in actually practicing dentistry but only to allow the patient to select the dental laboratory technician of his choice. The Petitioners contend that the patient is the consumer of the denture and that the patient is ergo the consumer of dental laboratory technician services. This contention is clearly erroneous as evidenced by KRS 313.247(1) which states:

> No dentist shall use the services (of a dental laboratory) . . . without first furnishing such unlicensed person a written laboratory procedure work order. . . .

It is apparent that the *dentist* is the person using the laboratory services and that it is the *dentist* who has a duty to furnish a written work order to the laboratory and not to the consumer or patient. Kentucky law specifically outlaws a dentist from simply turning over a written work order to a patient. It is the dentist who is ultimately responsible for the fit, workmanship, and quality of any oral appliance of his patients. It is the dentist who would be liable both civilly for malpractice and criminally pursuant to KRS 313.990 if a dental laboratory technician failed to follow oral and written instructions of a dentist and produced an unsuitable denture. The dentist would also be liable and under constant fear that his patient may not come back for the needed refittings and instead opt to save pennies and allow a less educated and untrained technician attempt to manipulate the denture in the patient's mouth. Kentucky laws are intended to prevent this result by making the dentist, not an unlicensed technician, ultimately and solely responsible to the patient.

As shown in the record by the depositions of many dentists and parties, the process of fitting a denture is complex and requires not only an initial visit by the patient for the purpose of taking impressions of the human teeth, but repeat examinations for refittings and realignments. The work order the dentist sends requires close communication and cooperation between the dentist and the dental laboratory technician to insure a proper result. Kentucky statutory provisions are intended to protect the patient and require the dentist, who is more trained and educated and licensed,

to perform these services and bear the ultimate responsibility.

I. *Parker* v. *Brown* Exemption

Even assuming that the Petitioners in their amended complaint have proven up a violation of the Federal Anti-trust laws, it is submitted that there is still no violation in light of the exemption recognized in *Parker* v. *Brown,* 317 U. S. 341 (1943). The acts complained of by the Petitioners are acts authorized and required by the Kentucky Dental Health Care Regulatory Scheme. Thus, there is authority from this court that the Sherman Act does not apply to a state's anti-competitive regulation when the state imposed such regulations "as an act of government," *Parker* v. *Parker, supra,* page 352.

II. The Petitioners Have No Standing to Allege First Amendment Violations.

The United States Court of Appeals for the Sixth Circuit clearly states that the Petitioners' first amendment attack was given up and not addressed for review by that court:

> "Although there is a suggestion in the Petitioners' Brief of some dissatisfaction with the trial court's findings with respect to the alleged First Amendment violation, the Petitioners' appeal abandons the constitutional attack upon the Kentucky statute and confines itself to the anti-trust claims." Opinion of the United States Court of Appeals for the Sixth Circuit decided and filed September 24, 1982.

The Respondent contends that if the First Amendment argument was not adequately prepared for review by the United States Court of Appeals, then it should not be considered by the Supreme Court of the United States.

CONCLUSION

For the reasons set forth above, the Respondent moves this court to deny the Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and to uphold the decision of the United States Court of Appeals which concluded that:

> We believe this language clearly articulates a state policy that dental technicians have contact with and sell to the dentists only and not to the public at large, and that it is the dentist's responsibility to deliver his work orders to the dental technician he chooses.

Respectfully submitted,

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